THE SIXTH CIRCUIT'S DOCTRINE OF CONSENT ONCE REMOVED: CONTRABAND, INFORMANTS AND FOURTH AMENDMENT REASONABLENESS

I. INTRODUCTION

The drafters of the Fourth Amendment understood that feeling safe and secure in one's home was an indispensable attribute of a free society.[1] In light of that understanding, the founding fathers constitutionally mandated that the American people have the right to be free from unreasonable searches and seizures by the government.[2] Unfortunately, the vague and malleable meaning of the word "unreasonable" has enabled the judicial system to pervert the protections of the Fourth Amendment when dictating its real world implications in cases involving present day criminal activity.

In *United States v. Yoon*,[3] the Sixth Circuit upheld law enforcement's utilization of the Consent Once Removed ("COR") doctrine as applied to government informants. The COR doctrine allows the consensual right of entry offered to an undercover police informant as part of a police investigation to transfer to other law enforcement officials waiting outside by virtue of that informant's agreement to work with the police in that investigation.[4] This Note argues that the *Yoon* decision unconstitutionally extended an already strained Fourth Amendment doctrine whose future application will result in police

1. *See* Robert J. McWhirter, *Molasses and the Sticky Origins of the Fourth Amendment*, 43 ARIZ. ATT'Y 16 (2007).

2. *See* U.S. CONST. amend. IV.

3. 398 F.3d 802 (6th Cir. 2005).

4. *See generally* United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); United States v. Akinsanya, 53 F.3d 852 (7th Cir. 1995); United States v. Jachimko, 19 F.3d 296 (7th Cir. 1994); United States v. Diaz, 814 F.2d 454 (7th Cir. 1987); United States v. Paul, 808 F.2d 645 (7th Cir. 1986); United States v. Janik, 723 F.2d 537 (7th Cir. 1983). Surely, it seems odd that a third party who does not reside in nor have a claim of ownership to a private dwelling can somehow extend the consensual nature of his entry, as extended by the owner, to a dozen warrant-less police officers waiting outside simply because the police and that individual have previously agreed that he will act as a "government agent" on their behalf. The uneasy feeling produced by a newfound awareness of this police practice is magnified when one learns that these government agents are almost always untrustworthy individuals who have themselves been recently arrested for a crime and are cooperating with the authorities in exchange for the promise of leniency. *See Yoon*, 398 F.3d at 813 (Gilman, J., dissenting). In other circumstances these government agents may be career informants who are involved in or close to the distribution of illicit substances, yet instead of being arrested themselves, they are paid as much as $10,000 every time they aid the police in an investigation that leads to a conviction. *See* Baith v. State, 598 A.2d 762, 764 (Md. Ct. Spec. App. 1991).

practices that violate the spirit of the Fourth Amendment, offend generally understood notions of American society and clash with relevant Supreme Court precedent.

Three separate streams of analysis will be explored to support these assertions. Part II will supply the necessary background information. In Part III.A., a study of the Fourth Amendment's history and the societal circumstances, which spawned its language, proves the COR doctrine violates the spirit and purpose of the Amendment. Part III.B. emphasizes that the doctrine's application, when only an informant is involved, is not considered "reasonable" based on current societal norms and values, and cannot be made otherwise by a court's utilization of linguistic wizardry. Finally, Part III.C. shows that the doctrine, as it currently stands, is supported by legal arguments that run afoul of principles outlined in the Fourth Amendment jurisprudence of the United States Supreme Court.

II. BACKGROUND

A. The Historical Foundations of the Fourth Amendment and Their Relevance to its Modern Day Application

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[5]

Academic commentators have pointed out that "[t]he Fourth Amendment to the United States Constitution, although a direct response to the historical and social period in which it was adopted, has the same significance and meaning today that it did over 200 years ago."[6] One can find support for this assertion by comparing the social circumstances surrounding the Fourth Amendment's creation with those of present day American society.[7] A study of our country's historical beginnings shows

5. U.S. CONST. amend. IV.

6. Martin Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107, 108 (1987).

7. In his article entitled *Molasses and the Sticky Origins of the Fourth Amendment*, Robert J. McWhirter leads the reader through the development of the Fourth Amendment's underlying principles and submits that the key circumstantial ingredient which ignited the American Revolution was rum, the alcoholic product of fermented

molasses. McWhirter, *supra* note 1, at 16. The issuance of *Writs of Assistance* by the English Crown, which gave customs officials the ability to search anywhere at any time for any reason, were implemented in the Colonies with the specific goal of combating the illegal smuggling of cheap molasses from the West Indies in violation of the Molasses Act of 1733. *Id.* at 27. The Molasses Act of 1733 stated that the American colonies could only buy molasses for rum from the British West Indies. *Id.* at 24. Since this source was unable to provide an ample supply at a reasonable price, however, the colonists began to obtain their molasses from all areas of the West Indies, including those under Spanish and French control. *Id.* at 26-28. They did so while making trips through the Triangle Trade (slave trade) routes, traveling from the colonies to the "Slave Coast" of Africa, then to the West Indies before returning back to the American colonies. *Id.* at 24, 26-27. The Seven Years' War (1754-1763) pitted the British against the French and the Spanish and motivated the British Crown to issue the *Writs of Assistance* to colonial customs officials. *Id.* at 27. These general warrants represented an attempt to strictly enforce the Molasses Act, as Britain no longer wanted its colonies to do business with French and Spanish sovereigns. McWhirter, *supra* note 1, at 27. These warrants were good for the life of the king and enabled a customs official to search for contraband anywhere at anytime for any reason. *Id.* In another historical account of the Warrant clause of the Fourth Amendment, Martin Grayson writes:

> A prominent factor disposing the colonists toward war with England, in many cases the land of their birth, was hatred of the general search power associated with the Writs of Assistance issued by King George II for use in the colonies. Taxes were oppressive, conscription and impressment was inhumane, and the involuntary quartering of soldiers was a personal and economic hardship. But these, and other abhorrent practices of the absentee sovereign, depended on the iniquitous general warrants in some measure.

Grayson, *supra* note 6, at 108 (citing N.B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 51-78 (1973)). The language of the Fourth Amendment can be directly traced back to the statements made in opposition of the *Writs of Assistance* by colonial lawyer James Otis Jr. prior to the revolutionary war. McWhirter, *supra* note 1, at 30-31. A group of men historically known as the "Sixty-Three Boston Merchants" petitioned for a hearing to oppose the issuance of a new round of the *Writs* following the original's expiration upon the death of King George II in 1760. *Id.* at 28, 30. In doing so, they hired James Otis, Jr. as their council. *Id.* at 30. Though Mr. Otis ended up losing the case, in his oral argument he "highlighted the important legal principles that through John Adams became the Fourth Amendment." *Id.* at 30-31. Otis stated that,

> [g]eneral warrants with indefinite terms are illegal making the only legal warrant a 'special warrant': [A] special warrant directed to specific officers, and to certain houses, &. especially set Fourth in the writ may be granted . . . upon oath made . . . by the person, who asked [for the warrant], that he suspects such goods to be concealed in those very places he desires to search.

Id. at 30 (quoting LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 158 (1999)). John Adams, who at the time was a young lawyer present in the courtroom, would later identify Mr. Otis's argument against the *Writs of Assistance* ". . . as the Commencement of the Controversy between Great Britain and America." *Id.* at 31 (citing Levy at 158). Based upon Mr. Otis's argument against the *Writs of Assistance*, John Adams drafted the Massachusetts Declaration of Rights of 1780, which James Madison relied upon heavily in his drafting of the Fourth Amendment as we know it today. McWhirter, *supra* note 1, at 32-33. John Adams has been quoted as saying, "Then and there the child Independence

that there has always been and will always be contraband of one sort or another within the United States. This was true when the Fourth Amendment was drafted, and it remains true today.[8] Who is in possession of contraband and who intends to wipe out its existence in our society is a question relative to the current circumstances of the time period. The drafters of the Fourth Amendment clearly understood this and designed the Fourth Amendment to err on the side of personal privacy, guaranteeing the citizens' right to be free from overzealous government intrusions into their private affairs.[9]

It may be that the above assertion has been overshadowed by our society's admittedly serious criminal problems. Many scholars have observed that the Fourth Amendment's protective effect has been drastically altered as courts attempt to covertly assist the other branches of government in dealing with the increasingly difficult problem of drug abuse in America.[10] It seems clear that "[t]he Court has been influenced by the problems of drugs and an understandable concern that its decisions must not make it impossible for the government to address these problems."[11] Law enforcement has welcomed this covert assistance and quickly taken advantage of doctrines such as COR because these doctrines ease catching individuals in the act of possessing and distributing contraband.[12] Those who view this judicial trend negatively argue that "liberty denied to those suspected of dealing in drugs is liberty denied to all."[13]

[*sic*] was born," referring to the day Mr. Otis argued against the oppressive *Writs of Assistance*. *Id.* at 31 (citing LEVY, *supra*, at 157).

8. *See* discussion, *supra* note 7.

9. *See* discussion, *supra* note 7.

10. Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated By the Open Field Doctrine)*, 48 U. PITT. L. REV. 1, 2-3 (1986).

11. Saltzburg, *supra* note 10, at 21 (proposing that the "open fields" doctrine was crafted specifically to help law enforcement deal with the cultivation of marijuana). A similar pattern seems to have occurred in regard to the COR doctrine. COR is very well suited for addressing drug sales in urban environments, most notably the urban "crack" epidemic which began in the late seventies and surged through the early eighties into the present day. Oddly enough, the Seventh Circuit first adopted the COR doctrine in *Janik* in 1983. *See* discussion, *supra* note 4.

12. In 2003, an issue of the FBI Law Enforcement Bulletin featured an in depth summary of the COR doctrine which was intended to familiarize Law Enforcement Officials with the elements of a COR "buy bust" police operation. Edward M. Hendrie, *FBI Law Enforcement Bulletin: COR*, FBI L. ENFORCEMENT BULL. 24, VOL. 72; ISSUE 2 (2003). The article reviews relevant search and seizure law, informs readers of the usefulness of the COR doctrine and outlines the facts of various COR cases to serve as examples of how to utilize the doctrine. *Id.*

13. Saltzburg, *supra* note 10, at 3.

Most Fourth Amendment cases, including the *Yoon* decision, seem to, at some point and in some form, echo the Supreme Court's language in *Coolidge v. New Hampshire*,[14] which stated, "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'"[15] Courts continue to cite such language while at the same time crafting legal precedents that seem to limit the protections of the Fourth Amendment without falling into one of these "carefully defined set of exceptions."[16] This Note will argue that the COR doctrine's application to government informants constitutes just such a precedent and is the product of a narrow and inadequate vision of the Fourth Amendment's overall purpose.[17]

B. Consent Once Removed and its Extension to Government Informants

The COR doctrine has never been reviewed by the Supreme Court[18] and is entirely the creation of the Seventh Circuit Court of Appeals.[19] Judge Kennedy, in her *Yoon* concurrence, discussed the origins of the COR doctrine and emphasized that it was the product of "cases where the government was unable to rely upon exigent circumstances to justify the warrantless entry into a suspect's home by officers who entered the suspect's home after the government informant or undercover agent had established probable cause to arrest the suspect."[20]

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14. 403 U.S. 443 (1971).

15. *Yoon*, 398 F.3d at 805 (citing Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971).

16. *See id.* at 808 (noting in the concurring opinion that "[n]either exigent circumstances nor the traditional consent exception to the warrant requirement supports the application of the [doctrine of COR]").

17. It should be noted that the Supreme Court in *Coolidge* also remarked that "[i]t has been repeatedly decided that these Amendments [the Fourth and Fifth Amendments] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous executive officers." *Coolidge*, 403 U.S. at 454 (citing Gouled v. United States, 255 U.S. 298, 303-04 (1921)). This language seems to fall in line with the spirit and purpose of the Fourth Amendment as it was originally created, yet sadly cases like *Yoon* show that this portion of the *Coolidge* opinion has fallen by the wayside in the wake of our modern and misguided Fourth Amendment jurisprudence.

18. *See, e.g.*, *Yoon*, 398 F.3d at 802, *cert. denied*, 546 U.S. 977 (2005).

19. *See* cases discussed, *supra* note 4.

20. *Yoon*, 398 F.3d at 808-09.

1. The Seventh Circuit's Consent Once Removed Doctrine

The Seventh Circuit first articulated the COR doctrine in *United States v. Janik*.[21] In *Janik*, the defendant invited his friend, who he knew was a police officer, to his apartment to view his illegal firearms and that friend, prior to visiting defendant's apartment, contacted the Federal Bureau of Alcohol, Tobacco and Firearms as well as the Chicago police.[22] These law enforcement officials quickly concealed themselves outside the defendant's apartment and waited for the two men to arrive.[23] Defendant's police officer friend entered his apartment, where he viewed the illegal gun. The friend then excused himself to go to the lobby of defendant's apartment, where he opened the locked door and allowed the warrantless arrest team into the building. The team then arrested the defendant and seized the firearms.[24] The trial court denied the defendant's motion to suppress.[25] In upholding the lower court decision, the Seventh Circuit reasoned that there was no violation of the defendant's Fourth Amendment rights because he had consented to the entry of his police officer friend in order to show him the illegal gun and that friend, who could have arrested defendant himself upon seeing the weapon, was entitled to get help from other officers.[26] The court based this conclusion on the well settled principle that "[v]alid consent is of course a substitute for a warrant."[27]

The Seventh Circuit, in continuing to validate warrantless police searches and seizures based on the concept of COR, took the doctrine a step further in the case of *United States v. Paul*,[28] which made its way to that court only three years after the *Janik* decision. In *Paul*, the individual who was initially offered consensual entry onto the private property of the defendant for the purposes of conducting a drug transaction was not a police officer but a confidential informant who was aiding the police.[29] In justifying the extension of the COR doctrine to cases where the initial entry is performed by a civilian working with the police, the Seventh Circuit pointed to the existence of the citizens arrest power, stating that because the government agent "could have made a

21. 723 F.2d at 537.
22. *Id.* at 541.
23. *Id.*
24. *Id.*
25. *Id.* at 542.
26. *Id.* at 547-48.
27. *Janik*, 723 F.2d at 548 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)).
28. 808 F.2d at 645.
29. *Id.* at 646-47.

citizens arrest . . . we think the principle [of COR] extends to the case where the initial, consensual entry is by a confidential informant."[30]

Following *Paul*, the Seventh Circuit validated law enforcement's use of the COR doctrine as applied to government informants in subsequent cases, all of which had a fact pattern very similar to the one in *Paul*.[31] It is this extension of the COR doctrine, predicated almost entirely on the existence of a "citizen's arrest power," that is the primary focus of this Note.

2. The Sixth Circuit's Adoption of Consent Once Removed

The Sixth Circuit first adopted the Seventh Circuit's COR doctrine in *United States v. Pollard*.[32] There, the court emphasized a three element test for establishing the constitutionality of a "buy bust" operation based upon the doctrine as it had been cultivated by the Seventh and Ninth Circuits.[33] In adopting the doctrine, the Sixth Circuit stated that a valid COR search and seizure requires that "[t]he undercover agent or informant: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers."[34]

In *Pollard* and *United States v. Romero*,[35] the second COR case upheld in the Sixth Circuit, an undercover law enforcement official initially received consent to enter. Therefore, it was not until the *Yoon* case that the Sixth Circuit had a chance to determine if it would allow the

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30. *Id.* at 648.

31. *See, e.g.*, *Diaz*, 814 F.2d at 454 (validating use of the COR doctrine in a case where a confidential informant, an "old friend" of the defendant, set up a cocaine deal between the defendant and an undercover officer, who upon seeing the contraband, summoned an arrest team that made a warrantless entry into the defendant's home, arrested him, and seized a large quantity of cocaine); *Jachimko*, 19 F.3d at 296 (upholding the warrantless entry of law enforcement officials in to the house of an unknown third party after the government informant, who had been escorted to that residence by the target of the "buy bust" operation, signaled that he had observed contraband inside). *See also Bramble*, 103 F.3d at 1475; *Akinsanya*, 53 F.3d at 852.

32. 215 F.3d 643 (6th Cir. 2000) (upholding the constitutionality of an arrest team's warrantless entry into the defendant's residence after he consensually allowed an undercover officer and an informant in to complete a drug transaction).

33. *Id.* at 648.

34. *Id.* (quoting *Akinsanya*, 53 F.3d at 856).

35. 452 F.3d 610 (6th Cir. 2006) (applying the COR doctrine to a case where the defendant consensually allowed an undercover police officer to enter his hotel room to sell him methamphetamine).

COR doctrine to operate in situations where the initial entry was made only by a government informant.[36]

In *Yoon*, Meen W. Kim, after being arrested for a drug transaction, "agreed to act as an informant for the Tennessee Bureau of Investigation" and immediately set up a marijuana deal with Yoon.[37] Yoon invited Kim to his apartment and police supplied Kim with a transmitter, which he was to use to signal the police once he saw the marijuana.[38] Upon receiving the signal from Kim, an arrest team positioned nearby made a warrant-less entry into the apartment and arrested Yoon as he attempted to escape out a window.[39] Yoon pleaded guilty to conspiracy with the intent to distribute more than fifty kilograms of marijuana, but specifically reserved the right to appeal the constitutionality of the police officer's warrantless entry into his apartment.[40]

After noting that the issue presented in *Yoon* was one of first impression,[41] the court upheld the doctrine's extension stating, "[t]oday, we extend that concept to cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest."[42]

Though the majority opinion fails to offer any clear legal justifications for that extension of the COR doctrine, Judge Kennedy's concurrence attempts to explain the Court's decision.[43] Most relevant was Judge Kennedy's statement that the COR doctrine,

> is based upon the theory that, because an undercover agent or informant who establishes probable cause to arrest the suspect may in fact arrest him then and there, he should be entitled to call in the agents with whom he is working to assist in the arrest

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36. *Yoon*, 398 F.3d at 806 (stating that the "[t]he *Pollard* courts specific statement that the doctrine applies when 'an officer *or informant* (emphasis added) . . . enters at the express invitation of someone with authority to consent,' (*Pollard*, 215 F.3d at 648) (emphasis added) was dicta, rather than part of the holding" because the Sixth Circuit had yet to be presented with a case where an undercover officer had not been part of the initial consensual entry).

37. *Id.* at 804.

38. *Id.*

39. *Id.*

40. *Id.* at 804-05.

41. *Id.* at 807.

42. *Yoon*, 398 F.3d at 808.

43. *Id.* at 808 (Kennedy, J., concurring) (stating that she writes separately "to explain why the [COR] doctrine adopted by our court in [*Pollard*] to apply to undercover police officers (and in dicta to informants) is equally applicable to informants in light of the doctrine's conceptual foundation").

> because, once the suspect invites the agent or informant into his house and displays his illegal activity to him, the suspect's Fourth Amendment expectation of privacy has been "fatally compromised."[44]

Judge Kennedy then attempted to justify why undercover officers and government informants should be treated the same under the COR doctrine.[45] In doing so she pointed to the citizens arrest power stating "[t]he only power that is traditionally viewed as a police power that is potentially necessary to support this doctrine is the arrest power . . . [and that power] does not lie in the sole province of the police, but rather has been granted to the citizens of many states."[46]

C. The Importance of Widely Shared Social Expectations in Assessing Fourth Amendment Reasonableness

In the recent case of *Georgia v. Randolph*,[47] the Supreme Court, per Justice Souter, announced that the "constant element in assessing Fourth

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44. *Id.* at 809-10 (Kennedy, J., concurring) (quoting *Paul*, 808 F.2d at 648; citing *Bramble*, 103 F.3d at 1478).

45. *Id.*

46. *Id.* at 810 (citing 5 Am.Jur.2d *Arrest* § 56; 133 A.L.R. 608). Relying on the citizens arrest power to justify the extension of the COR doctrine to government informants was recently rejected by the Tenth Circuit Court of Appeals. In doing so that court stated, "[w]e find the distinctions between an officer and an informant summoning additional officers to be significant . . . [because] [i]n this context the person with the authority to consent never consented to the entry of police into the house." Callahan v. Millard County, 494 F.3d 891, 896-97 (10th Cir. 2007).

47. 547 U.S. 103 (2006). In *Randolph*, Janet Randolph summoned police to the family home, which as of late had only been occupied by her estranged husband Scott, claiming that he had taken their son away in the midst of a domestic dispute. *Id.* at 107. In explaining to the police the couple's marital problems and her recent relocation to her parent's house in Canada as a result, she also told police that her husband was a cocaine user whose habit had caused the family financial problems. *Id.* During their preliminary discussion with Janet, Scott returned and explained that he had taken the couple's son to the neighbor's house out of concern that his wife might take him out of the country again. *Id.* Scott further claimed that he was not a cocaine user and that it was his wife who had a problem with drugs and alcohol. *Id.* After police retrieved the couple's son from the neighbor's house, Janet again told the police that her husband was a drug user and further asserted that there were drugs and paraphernalia currently in the house. *Id.* Scott "unequivocally refused" to give his consent to a police search of his residence but unfortunately for him, Janet was more than willing to offer hers instead. *Randolph*, 547 U.S. at 107. Janet voluntarily escorted an officer through the house and to an upstairs bedroom which she identified as Scott's, where in plain view the officer observed "a section of a drinking straw with a powdery residue [which the officer] suspected was cocaine." *Id.* In seeking advice from the district attorney on how to proceed, the officer

Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules."[48]

The Court framed the newly presented issue in *Randolph* as one concerning "whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."[49] Emphasizing that the issue revolves around the "social expectations" which our American culture considers reasonable,[50] the Supreme Court began by noting that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions."[51] The Court felt that this common social expectation of privacy was the result of our societies understanding that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority."[52]

In light of this observation, the Court in *Randolph* reasoned that:

> Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly, in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, the cooperative occupant's invitation adds nothing to the government's side to counter the force of an

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was instructed to stop the search and apply for a warrant using the section of straw to establish probable cause. *Id.* After obtaining a search warrant the police seized further evidence from the family home which was used to indict Scott for possession of cocaine. *Id.* Scott's motion to suppress was denied by the Trial Court and the Georgia Court of Appeals reversed. *Id.* at 108. That decision was affirmed by the Supreme Court of Georgia, and the United States Supreme Court granted certiorari to determine this newly presented issue in consensual search and seizure law. *Id.*

48. *Id.* at 111 (citing Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978)) ("[l]egitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

49. *Id.* at 108.

50. *Id.*

51. *Id.* at 113.

52. *Id.* at 113-14.

> objecting individual's claim to security against the government's intrusion into his dwelling place.[53]

Therefore, the Supreme Court's most recent resolution of a Fourth Amendment reasonableness question involved a weighing of the individual and government interests implicated, while using commonly accepted expectations of privacy as a baseline consideration.[54]

D. The Related Doctrine of Third Party Consent

The doctrine of COR embodies a police practice whose effects and theoretical justifications are very similar to the doctrine of Third Party

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53. *Randolph*, 547 U.S. at 114-15 (citing Camara v. Mun. Court of City and County of San Francisco, 387 U.S. 523, 536-37 (1967)). The Supreme Court's citation of the *Camara* balancing analysis in *Randolph* has caused some confusion as to the test's proper application. It was previously understood that the *Camara* balancing test was only used in determining the reasonableness of "administrative searches" where criminal apprehension was not the main goal. *See* Steven Yarosh, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103, 1111-13 (1992). Later Supreme Court cases, however, including *Randolph*, have blurred that distinction. *See* Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives The Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 433 (2007). As Butterfoss noted:

> Although the Court in *Camara* created the balancing test in part to provide an analytical framework for administrative or regulatory searches in which the traditional notion of probable cause did not apply, the Court quickly extended the balancing test to criminal investigations, utilizing the test to uphold various police actions on individualized suspicion amounting to less than probable cause. In its very next term, in one of the first cases to apply *Camara*'s balancing test, the Court in *Terry v. Ohio* utilized the test in the criminal investigation context to uphold stops and frisks on the basis of reasonable suspicion.

Id.

54. Other Supreme Court cases dealing with proposed exceptions to the warrant requirement support the application of a balancing inquiry to determine the reasonableness of the Sixth Circuit's COR doctrine. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (Scalia, J., majority) (determining the reasonableness of a passenger's purse being searched when it was found during the legal search of an automobile; the court wrote, "[w]e must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests"); Terry v. Ohio, 392 U.S. 1, 20-21 (1968) ("In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" (citing *Camara*, 387 U.S. at 534-35, 536-37)).

Consent ("TPC"). The doctrine of TPC as it currently stands is a judicially condoned police practice that has received heavy criticism from Fourth Amendment commentators.[55] In spite of this negative treatment, the Supreme Court has continued to mold the doctrine throughout a development period that spans nearly twenty eight years.[56] It is essential to distinguish the COR doctrine on this point. TPC was crafted by Supreme Court jurisprudence while the COR doctrine is entirely the creation of federal appellate courts. In order to clearly understand the unconstitutionality of the COR doctrine as applied by the Sixth Circuit, a cursory understanding of the TPC doctrine is necessary.[57]

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55. *See* Nancy J. Kloster, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary TPC Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99 (1996). In this article, the author outlines the development of the TPC doctrine as it progressed in a string of Supreme Court cases. It is then submitted that the outcome of this doctrinal development is a "Fourth Amendment which retains the original language, but fails to deliver the protection it was intended to guarantee . . . [because] an individual's privacy may be legally invaded by someone else." *Id.* at 104.

56. *See* Illinois v. Rodriguez, 497 U.S. 177 (1990); United States v. Matlock, 415 U.S. 164 (1974); *Schneckloth*, 412 U.S. at 218; Frazier v. Cupp, 394 U.S. 731 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968); Stoner v. California, 376 U.S. 483 (1964).

57. The idea that one can waive their own Fourth Amendment rights was first articulated by the Supreme Court in *Stoner v. California*, which held that a hotel clerk could not consent to a police search of a patron's room because the clerk lacked the authority to waive that patron's Fourth Amendment rights. 376 U.S. at 489. *Stoner* evidences that in its early stages, the doctrine of TPC was completely grounded in the concept of "waiver," which could only be accomplished by the person whose rights were at stake. However, that quickly changed with the case of *Bumper v. North Carolina*, which integrated into the doctrine the concept of "joint property ownership." 391 U.S. at 548 n. 11. This concept expanded the range of people who may "waive" an individuals Fourth Amendment rights as they relate to a piece of property or a private area because anyone with common authority over the items or area to be searched could now do so; even if their ownership or actions related to that subject matter was not the concern of the police's inquiry. *See* Kloster, *supra* note 55, at 105-06. The next step in the development of TPC was taken in *Frazier v. Cupp*, which added an "assumption of risk" concept to the doctrinal framework reasoning that "by allowing his cousin the use of the [gym] bag, and by leaving it in his home, [the defendant] Frazier *assumed the risk* that his cousin may allow someone else to look inside." *Id.* at 106 (summarizing the reasoning in *Frazier*, 394 U.S. at 740) (emphasis added). By weaving the assumption of risk theory into the doctrine of TPC, the court limited the protections of the Fourth Amendment further. After *Frazier*, a third party could "speak for an individual in his or her absence," simply because that individual had received permission to use a piece of property or private space. *Id.* at 107. The Supreme Court further expounded on this principle in *United States v. Matlock* when it emphasized that under circumstances where more than one person has access to or control over a protected area, "the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial." *Matlock*, 415 U.S. at 169-70.

The doctrine of TPC, which near the end of its development was supported by the legal concepts of "waiver," "joint ownership of property" and "assumption of risk,"[58] was further expanded by the Supreme Court in *Illinois v. Rodriguez*.[59] Basing its decision on the Fourth Amendment's prohibition against "unreasonable" searches and seizures, the Supreme Court held that "[the] determination of consent to enter [as given by a third party] must be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises?"[60]

Prior to this case, a person could still protect his or her privacy by refusing others access to their private areas or belongings. After *Rodriguez*, however, even the most stringently guarded aspects of one's private affairs are not immune from warrantless police search and seizure if it is possible for officers to reasonably believe that a third party had the authority to consent to a police inspection of those articles and areas. In his *Rodriguez* dissent, Justice Marshall noted this substantial departure from conventional Fourth Amendment assumption of risk analysis when he wrote, "[a] search conducted pursuant to an officer's reasonable but mistaken belief that a third party had authority to consent is thus on an entirely different constitutional footing from one based on the consent of a third party who in fact has such authority."[61]

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58. *See* discussion, *supra* note 57.

59. 497 U.S. 177 (1990). In *Rodriguez* the police were called by Gail Fisher, who claimed to have been assaulted by her ex-boyfriend, respondent Edward Rodriguez, earlier that day at his apartment. *Id.* at 179. Fisher then consented to escort the police to Rodriguez' apartment where she would aid them in arresting Rodriguez by unlocking the door and allowing them in. *Id.* During their trip, Fisher referred to the apartment as "our[s]" and stated that she had property there, buttressing the officers' assumption regarding her authority to allow them in. *Id.* at 179-80. Without a warrant, but with Fisher's consent, the police entered Rodriguez's apartment where they observed cocaine in plain view and then proceeded to Rodriguez bedroom where he was awakened from a nap and arrested. *Id.* at 180. Rodriguez was charged with possession of a controlled substance. *Id.* He moved to suppress all the evidence seized from his apartment on the ground that Fisher lacked the requisite common authority to consent to the search and seizure performed. *Rodriguez*, 497 U.S. at 180. It was determined by the fact finding court that Fisher was only an "infrequent visitor" since her name was not on the lease, she did not pay rent, she could not invite others over nor had access to the apartment when Rodriguez was away, and finally, she and her children had moved out a month prior to the incident. *Id.* at 180-81.

60. *Id.* at 188-89 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

61. *Id.* at 194 (Marshall, J., dissenting).

III. ANALYSIS

A. The COR Doctrine Violates the Spirit and Purpose of the Fourth Amendment

The manipulation of the Fourth Amendment by federal appellate courts in an attempt to aid law enforcement in waging its War on Drugs seems ill advised in light of the historical circumstances in which the Fourth Amendment was created. Those who drafted the Fourth Amendment were not blind to the existence of crime predicated on illicit substances. Yet the founders still believed that the harm which follows an oppressive government's unchecked intrusion into the sanctity of a citizen's private affairs was far greater than any that could be created by the persistent existence of contraband and its illegal distribution. Justice Stewart best embodied the conceptual understanding that modern day criminal activity is not so different from that which existed at the time the Fourth Amendment was conceived when he wrote:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In *times not altogether unlike our own* they won-by legal and constitutional means in England, and by revolution on this continent-a right of personal security against arbitrary intrusions of official power.[62]

Unfortunately it seems that this constitutional ideal has been brushed aside by courts that have adopted the COR doctrine in an attempt to aid law enforcement in addressing the most current version of a timeless issue. The theoretical argument against the constitutionality of the Sixth Circuit's extension of the COR doctrine is perfectly summarized by the following passage:

> While to some, the exigency of the drug situation may suggest that a loosening of the proscriptions of the Fourth Amendment is in order, this court will not prostitute the protections of the Bill of Rights in the name of urgency or any other name. The battle

62. *Coolidge*, 403 U.S. at 455 (emphasis added).

to rid society of illicit drugs must be won within the framework of our Constitution lest we achieve a pyrrhic victory.[63]

B. Based on Current Societal Standards, the Consent Once Removed Doctrine is Constitutionally Unreasonable

Georgia v. Randolph was decided in 2006 and concerned the creation of a general exception to the Fourth Amendment's warrant requirement which in substance and circumstance was very similar to the doctrine of COR.[64] Following the analysis of the Supreme Court in that case, the governmental interests implicated by the use of the COR doctrine should be balanced against the invasion of individual privacy caused by the proposed exception to determine whether or not COR as applied to informants is reasonable under the Fourth Amendment.[65] In making this determination, the Supreme Court would give great consideration to the "widely shared social expectations" of our society regarding the invasion of privacy implicated in COR "buy bust" scenarios.[66]

Were the United States Supreme Court to perform such an analysis, it would certainly rule that the Sixth Circuit's COR doctrine was invalid. The utilization of COR by law enforcement does not implicate any governmental interests strong enough to overcome the unquestionably accepted social expectation that one is not automatically privileged to invite other third parties to a host's residence by virtue of the host's express invitation to that specific individual.

1. The Individual's Privacy Interest

The reasoning utilized to express the significance of the commonly understood privacy interest involved in *Randolph*[67] can easily be applied to the privacy interest implicated in COR cases involving informants whom the host has previously consented to enter a private area. It is simple enough to state that almost all civilized societies understand that being invited to enter another's private area is not an invitation to extend that consensual entry to third parties.[68] If this were not so, and any

63. United States v. Costa, 356 F. Supp. 606, 609 (D.C.D.C. 1973).

64. *See Randolph*, 547 U.S. at 111.

65. *See id.* at 114-15 (citing *Camara*, 387 U.S. at 533, 536-37).

66. *Id.* at 111.

67. *See id.* at 114-15.

68. If this were not the case, how could social gatherings and communal events ever be hosted? A dinner party would be an impossible feat if the host was unable to limit or anticipate the number of people they would be hosting. Similarly, wedding invitations

person given consent to enter a private area were entitled to bring along twelve friends, the modes and forms of social interaction we currently employ would be fatally compromised. This clear and "widely shared social expectation" of privacy implicates an extremely critical aspect of an individual's control over his or her private affairs, because this expectation comes into play in almost every social interaction involving consensual encounters. In this manner, it can be said that this individual privacy interest is more important than the one identified in *Randolph*.[69] The interest implicated in *Randolph* only applies when two or more joint occupants disagree on whether or not to admit a third party, a clearly less common scenario than inviting someone over to your house with the expectation they will not bring a group of unknown individuals along with them.

2. The Government's Interest in Utilizing COR

The government's only interest in being able to use the doctrine of COR as it applies to confidential informants has previously been presented to and rejected by the Supreme Court. While investigating the balance between the government's interest in effective law enforcement and the citizen's right to privacy within the scope of warrant-less in-home search and seizures generally, Justice Jackson exclaimed that "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement."[70] The same language was cited by the dissenting judge in the Sixth Circuit's *Yoon* decision, in which he followed that "there was no justifiable reason for the police not to seek a warrant before entering Yoon's apartment [since] 'there can be no claim that immediate police action was needed to prevent the destruction of vital evidence or thwart the escape of known criminals.'"[71]

The Sixth and Seventh Circuits have noted in their COR opinions, both majority and dissenting, that they too were puzzled as to why the

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expressly say who is invited and the number of guests they may bring so that the couple can plan for a specific number of particular individuals whom they wish to attend. Similar analogies can be made to private business affairs. Private meetings would no longer exist if everyone invited was entitled to bring along an unknown business associate.

69. *See id.* at 112-13.

70. Johnson v. United States, 333 U.S. 10, 15 (1948).

71. *Yoon*, 398 F.3d at 813 (Gilman, J., dissenting) (citing United States v. Morgan, 743 F.2d 1158, 1163 (6th Cir. 1984)).

police in these COR cases failed to obtain a warrant prior to entering the private area of a criminal who was obliviously unaware that he just committed a crime under police surveillance and in the presence of a government agent.[72] An examination of the State's brief in opposition of Yoon's petition for a writ of certiorari to the United States Supreme Court[73] further supports the assertion that there is no compelling justification for the existence of the COR doctrine. In its brief, the State fails to assert any government interest whatsoever that justifies the existence of COR and instead completely sidesteps the issue.[74]

The police, excited and anxious from their "engage[ment] in the . . . competitive enterprise of ferreting out crime," simply could not contain themselves long enough to wait for a determination of probable cause to be "drawn by a neutral and detached magistrate."[75] The Supreme Court dispelled any notion that ease of police work is a relevant interest in Fourth Amendment jurisprudence when it wrote that the warrant requirement "[i]s not an inconvenience to be somehow 'weighed' against the claims of police efficiency."[76] This is so because the primary objective of the warrant requirement is "to check the 'well-intentioned

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72. *See Diaz*, 814 F.2d at 457. The majority opinion validated the warrantless entry by stating:

> [w]e note initially that we are at a loss to understand why the police did not obtain at least a search warrant in this case. Diaz and his confederates had been under surveillance . . . since the day before the arrest, and the officers knew that the purpose of this stay . . . was a drug transaction. It therefore would have been possible . . . to obtain a search warrant . . . and execute it when and if Agent Mueller . . . stepped out into the hall and gave the signal.

Id. See also Pollard, 215 F.3d at 649-50 (dissenting from the Sixth Circuit majorities adoption of the COR doctrine, Judge Jones stated, "[N]or has it been shown, on the facts of this case, that any legitimate government interests purportedly vindicated by the COR doctrine override Pollard's privacy expectations").

73. Brief for the United States in Opposition, *Yoon*, 398 F.3d at 802 (No. 05-126) 2005 WL 2412715.

74. *Id.* There was good reason for that approach, as the facts of *Yoon* showed that the only potential justification for the warrantless entry, concern for the informant's safety because he was not given enough money to complete the drug transaction, was entirely created by the police themselves. *Yoon*, 398 U.S. at 804. There is clear Sixth Circuit precedent stating that police officers are not allowed to create exigencies by their own purposeful actions, since a contrary rule would leave the Fourth Amendment meaningless. *Morgan*, 743 F.2d at 1163 ("[p]olice officials, however, are not free to create exigent circumstances to justify their warrant-less intrusions."). Since Yoon had dealt with the government's agent before and clearly trusted him, and since there was no evidence that Yoon was aware of the police operation concerning his illegal activities, there was no justified excuse for the officer's warrant-less entry into his apartment.

75. *Coolidge*, 403 U.S. at 449 (citing *Johnson*, 333 U.S. at 13-14). *See also* United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

76. *Coolidge*, 403 U.S. at 481.

but mistakenly over-zealous, executive officers' who are a part of any system of law enforcement."[77]

3. The Sixth Circuit's Faulty Application of the Reasonableness Standard

Balancing the individual and government interests outlined above, in accordance with the reasoning of the Supreme Court in *Randolph*, confirms that the COR doctrine as applied to government informants is not reasonable under Fourth Amendment jurisprudence. A majority of the Sixth Circuit reached the opposite conclusion in *Yoon* because they addressed the concept of reasonableness from an improper perspective. In attempting to justify their extension of the COR doctrine the majority stated that "no further invasion of privacy is involved once the . . . informant makes the initial consensual entry,"[78] because the individual's expectation of privacy "has been fatally compromised when [he] admits a confidential informant and proudly displays contraband to him."[79] Therefore, "with [that] risk[]assumed, the incremental risk that [the invitee] would be an informant rather than a[] [government] agent but would invite agents in to protect him and arrest [the host] is too slight to bring the requirement of obtaining a warrant into play."[80]

It is admitted that in many COR situations, requiring the police to get a warrant seems pointless in the narrow sense because the individual in question will inevitably be arrested for his criminal acts one way or the other.[81] The majority in *Yoon* appears to have lowered its standard of reasonableness based at least in part on this fact. Nevertheless, addressing the issue from a broader perspective reveals that the warrant requirement is not about that individual criminal or specific police operation, it is the embodiment of a constitutional principle that needs to be stringently upheld for the benefit of all Americans. An analysis that focuses on commonly shared expectations of privacy is the proper vehicle for analyzing the constitutionality of the COR doctrine because it addresses the reasonableness of a proposed Fourth Amendment exception from the vantage point of our society generally.

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77. *Id.*

78. *Yoon*, 398 F.3d at 807-08.

79. *Id.* at 810 (citing *Bramble*, 103 F.3d at 1478).

80. *Paul*, 808 F.2d at 648.

81. The individual is certainly caught; the police are aware of his identity and his business practices, and have infiltrated his private affairs. Most likely there is enough evidence for the police to obtain a warrant since the money exchanged in the consensual encounter is always marked and the government agent wore a wire and recorded the business dealings while inside the individual's private area.

Conversely, the approach of the Sixth Circuit only considered the question from the narrow perspective of a person who has undoubtedly been caught red handed and will inevitably be arrested. Encroaching upon the rights of a criminal will always appear more reasonable than doing so upon the rights of law abiding citizens, however, the Constitution was not written to protect people in proportion to their moral or legal standing.[82] As was stated by the Supreme Court in *Coolidge*, citing the nineteenth century case of *Boyd v. United States*:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[83]

The doctrine of COR may seem like a trivial change in search and seizure law which in turn makes the difficult job of law enforcement officials a bit easier, but it may also be the first step in a steady decline of Fourth Amendment protections. This decline may potentially lead to the imposition of a general warrant scheme[84] imposed upon all Americans, not just those whose illegal activities are looked at with condemning eyes by the majority. The Sixth Circuit's extension of the doctrine of COR to government informants consists of just such a "slight deviation from legal modes of procedure"[85] that the Supreme Court warned of over 120 years ago, long before the "War on Drugs" skewed the court system's reasoning. One can only hope that when and if the Supreme Court chooses to settle this escalating issue, and determine the reasonableness of COR in the informant context, it will do so with the language of *Boyd* clear in its mind.

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82. *See, e.g.*, U.S. CONST. amend. IV. (stating: "The right of *the people* . . . .") (emphasis added).

83. *Coolidge*, 403 U.S. at 454 (citing Boyd v. U.S., 116 U.S. 616, 635 (1886)).

84. *See* McWhirter, *supra* note 1, at 27.

85. *Coolidge*, 403 U.S. at 454 (citing *Boyd*, 116 U.S. at 635).

C. COR's Unreasonable Circumvention of the TPC Doctrine

As stated above, United States Supreme Court has yet to accept an invitation to review a COR case, so the issue of its constitutionality has yet to be conclusively determined. Still, the doctrine has characteristics that are very similar to another search and seizure warrant exception developed by the Supreme Court, the doctrine of TPC. Both doctrines allow a person's Fourth Amendment rights to be waived in some sense without that person explicitly doing so. In both situations, a person unknowingly contributes to the relinquishment of their Fourth Amendment rights based on previous actions, related to a third party, which they could not foresee resulting in a legal, warrantless search of their property at a later time. This is so because each doctrine allows a person other than the individual in question to expose that individual's private affairs to the police without requiring the police to get a warrant or prove the presence of exigent circumstances.[86]

1. The Reasonable Limit of TPC

As indicated above, the Supreme Court has delineated an "objectively reasonable" standard for evaluating the beliefs of police officers regarding the validity of Fourth Amendment activity predicated on the TPC doctrine.[87] Addressing the facts of *Rodriguez* under that standard, the Supreme Court acknowledged that Rodriguez's ex-girlfriend, Fisher, did not have common authority to consent to the police search under the standard announced in *Matlock*,[88] but was willing to entertain the Illinois's assertion that the police officer's determination of Fisher's authority to consent was "reasonable" nonetheless.[89] While adopting this approach, the Court made sure to emphasize that their holding regarding this standard, "does not suggest that law enforcement officers may always accept a person's invitation to enter premises . . . .

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86. In the typical COR case, it is the consensual invitation of an individual, who happens to be a "government agent," which allows that agent to establish probable cause of a crime and summon back up officers. *See Pollard*, 215 F.3d at 649. In TPC cases, it is the act of sharing one's belongings or private space with another and thereby "assuming the risk," or in some cases simply associating with a third person who could reasonably appear to have shared authority over the given item or space. *See Rodriguez*, 497 U.S. at 181-82 (holding that a warrantless entry is valid when it is based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, even though the third party actually did not).

87. *Rodriguez*, 497 U.S. at 188-89 (quoting *Terry*, 392 U.S. at 21-22).

88. *Id.* at 181.

89. *Id.* at 182, 184-85.

the surrounding circumstances could be such that a reasonable person would doubt its truth and not act upon it without further inquiry."[90] The Supreme Court then remanded the case to the finder of fact to determine whether or not it was "reasonable" for the police to believe that Fisher had the necessary authority to consent to the warrant-less entry into and seizure of items from Rodriguez's apartment.[91] Thus, any doctrine of the lower courts, such as COR, which would allow the police to enter Rodriguez's apartment free and clear in spite of the TPC doctrine's reasonableness limitation must be constitutionally invalid in its effect.

In spite of being armed with the most expansive and limitless doctrine presently enunciated by the Supreme Court regarding consensual searches and seizures, law enforcement's ability to enter Rodriguez's apartment without a warrant under the circumstances of that case was questionable at best. Had those same officers instead been able to utilize the Sixth Circuit's doctrine of COR as applied to informants, however, they would have been able to gain entry into Rodriguez's apartment and easily seize the contraband. A comparison of COR's hypothetical application to the facts of *Rodriguez* will prove that COR permits the police to avoid the meager limitations imposed by the TPC doctrine, thereby allowing police officers to violate Supreme Court precedent under the guise of a different doctrinal terminology.

2. *Application of COR to the Facts of* Rodriguez

As is noted in the section discussing the development of the COR doctrine, all that is required for the police to make a warrantless entry into a private residence is a person agreeing to act as a "government agent." Once this person gains consensual entry into the suspect's protected area and establishes probable cause of a crime, an arrest team can make a warrantless entry.[92]

No court applying the COR doctrine has even expounded on the requirement of government agency and apparently no oath or signing of documentation is required. This integration of civilians into active police service seems to simply "occur" by way of an oral agreement between the executing officers and the civilian.[93]

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90. *Id.* at 188.

91. *Id.* at 189.

92. *Pollard*, 215 F.3d at 649.

93. *See, e.g.*, *Paul*, 808 F.2d at 646; *Jachimko*, 19 F.3d at 297; *Akinsanya*, 53 F.3d at 854 (stating that Saed Gilani, an admitted drug dealer, was cooperating with the authorities in the investigation of drug trafficking in the Chicago area pursuant to an *agreement* with the government) (emphasis added); *Yoon*, 398 F.3d at 804 (noting that following his arrest in June of 2002 for a drug deal, Meen W. Kim agreed to act as an

Based on this assertion, it seems that the police in the *Rodriguez* case and Ms. Fisher could have easily made such an agreement prior to arriving at Rodriguez's apartment. Had they done so, Fisher could have almost certainly gained consensual entry, most likely implied since she was Rodriguez's estranged girlfriend and at the very least, an "infrequent visitor" who had some property in the apartment.[94] Once she gained entry, all that was left to do was establish probable cause, which could have been based on her observance of cocaine in the apartment or possibly a rekindling of the day's previous argument which resulted in her assault.[95] Once either or both of those events occurred, Fisher could have summoned the waiting officers and their entry into Rodriguez' apartment would have been completely constitutional by Sixth Circuit standards.

Again, each of these doctrines is supported at least in part by the concept of "assumption of risk" as it applies to one's Fourth Amendment rights and the effect third parties may have on those rights.[96] It is illogical to propose that Yoon, by inviting in one acquaintance one time and showing him contraband, assumed more risk than Rodriguez did by keeping cocaine and other contraband in plain sight, while allowing Fisher to stay at his apartment, keep property there and appear to have authority over it.[97] In spite of this sensible observation, the *Rodriguez* case was remanded to the lower court to determine if the officer's belief in Fisher's authority to consent was reasonable, and the *Yoon* case was decided in favor of the state without hesitation.

3. Predicted Outcome Under Supreme Court Review

It cannot be possible that the Supreme Court would allow the limits of a doctrine it took almost thirty years to carve out to be circumvented by a doctrine created by inferior courts based on an identical legal principle, albeit different standards and terminology. In almost any case where TPC is utilized and the resulting invasion of privacy is brought into question as violating the Supreme Court's standards of

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informant for the Tennessee Bureau of Investigation (TBI) and immediately set up a marijuana transaction with Yoon).

94. *Rodriguez*, 497 U.S. at 180.

95. *See* discussion, *supra* note 59.

96. *See* Kloster, *supra* note 55. *See also*, *Yoon*, 398 F.3d at 810 (stating that "[t]he interest that the *Payton* [445 U.S. 573 (1980)] decision protects is the interest in the privacy of the home, and [that interest] has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him") (citing *Paul*, 808 F.2d at 648 (Kennedy, J., concurring)).

97. *See Yoon*, 398 F.3d at 808. *See also* discussion, *supra* note 59.

reasonableness, the police and the third party involved could have avoided the problem altogether by instead utilizing the COR doctrine of the Sixth Circuit. All that is required for them to do is effectuate a handshake agreement creating a position of government agency, and the granting of consensual entry to that agent by an individual who at the time has no idea they are completely forfeiting their Fourth Amendment rights in doing so.

Conversely, few if any of the cases where COR is successfully utilized would allow the same result under the standards of TPC.[98] Stated plainly, COR allows police to exceed the limitations placed upon them by the Supreme Court's least protective and most controversial Fourth Amendment doctrine concerning consensual searches and seizures. Therefore, COR would necessarily have to be struck down if reviewed by the Supreme Court, otherwise the Court would be forced to indirectly limit its reading of "unreasonable search and seizures" and take another bite out of an already emaciated Fourth Amendment.

IV. CONCLUSION

The constitutionality of the Sixth Circuit's decision in *United States v. Yoon* is in question. In that case the Sixth Circuit sanctioned the use of COR "buy bust" operations which utilize the assistance of government agents, also known as snitches.[99] The reasonableness of this doctrine in relation to the Fourth Amendment can be disputed on three separate albeit related fronts. At the outset, a brief summary of the historical events leading to the creation of the Fourth Amendment revealed that the COR doctrine as applied to government informants is diametrically opposed to the amendment's founding principles. That idealistic irreconcilability is supported by the application of Supreme Court precedent which focuses on our society's commonly shared social expectations of privacy. Under that approach, it is evident that the COR doctrine impedes upon at least one very important privacy expectation for which law enforcement can offer no interest strong enough to tip the

98. In none of the federal cases utilizing COR was the government informant in such a relationship with the focus of the police activity that they could be said to have the requisite common authority, as discussed in *United States v. Matlock*, 415 U.S. at 169-70, to consent to a police search of the area or items of interest. Furthermore, since the police are almost certainly aware of the informants situation, his or her relation to the target of the investigation and the circumstances of that relationship, it would never be "reasonable", as outlined in *Rodriguez*, 497 U.S. at 188-89 (quoting *Terry*, 392 U.S. at 21-22, for the police to believe that the informant did in fact have the required common authority.

99. *See Yoon*, 398 F.3d at 804.

balance in its favor. Lastly, the COR doctrine has the practical effect of impermissibly allowing law enforcement to circumnavigate the "reasonableness" limitation imposed by the Supreme Court in a different, yet strikingly similar and often applicable exception to the Fourth Amendment warrant requirement.

To protect the rights and privileges of the undesirables in our society is to indirectly protect the rights of all citizens. While the line between legal and illegal, right and wrong is in a constant state of flux, unconstitutional legal precedent may last forever and affect all citizens negatively. There is great risk in turning a blind eye to injustice that only affects an unappreciated sub-section of our society, for in the long run, the negative impact may be felt by all.

BEN SOBCZAK